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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRY B. ALLEN,

Petitioner,

v.

ILLINOIS,

Respondent.

On Writ Of Certiorari
To The Illinois Supreme Court

PETITIONER'S REPLY BRIEF ON THE MERITS

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ARGUMENT

I.

PRECEDENTS OF THIS HONORABLE COURT DEALING WITH SEXUAL PSYCHOPATH LEGISLATION AND WITH THE FIFTH AMENDMENT DEMAND THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION BE HELD APPLICABLE TO THE ILLINOIS SEXUALLY-DANGEROUS-PERSON PROCEEDING SINCE, CONTRARY TO THE RESPONDENT'S CLAIM, THE PROCEEDING IS NOT SIMPLY AN INVOLUNTARY MENTAL-HEALTH COMMITMENT PROCESS THE PROCEDURES OF WHICH MAY BE JUDGED BY BROAD DUE-PROCESS ANALYSIS.

Nearly thirty years ago, this Honorable Court cautioned "[h]ow simple would be the tasks of constitutional adjudication and of law generally if specific problems could be solved by inspection of the labels pasted on them!" *Trop* v. *Dulles*, 356 U.S. 86, 94 (1958). Time has come and gone but not so this Court's thought that the question of an individual's enjoying or being denied important constitutional rights should not be decided by "civil labels and good intentions." *In re Winship*, 397 U.S. 358, 365-66 (1970). *See also In re Gault*, 387 U.S. 1, 27, 50 (1967).

Nevertheless, in arguing that the Fifth Amendment privilege against self-incrimination should not apply in an Illinois sexually-dangerous-person proceeding, the State does neither more nor less than cite the civil label attached to the proceeding and the good intention it has of providing treatment to a person adjudicated sexually dangerous. In this regard, the State labels the sexually-dangerous-person proceedings as "essentially civil involuntary commitment procedures," the goal of which is to "provide for compulsory psychiatric care of persons suffering from a 'mental disorder'" (Brief for Respondent at 8-9). From this, the State concludes that the proceeding is not a "criminal case" within the meaning of the Fifth

Amendment and that the privilege against self-incrimination, as a result, is not applicable.

By labeling the sexually-dangerous-person proceeding a civil involuntary commitment procedure, the State avoids the specific sexual-psychopath-legislation jurisprudence in cases like *Specht* v. *Patterson*, 386 U.S. 605 (1967). The State likewise is able to avoid specific Fifth-Amendment jurisprudence regarding the privilege against self-incrimination, cases including *Gault* and *Estelle* v. *Smith*, 451 U.S. 454 (1981), cases relied upon by the petitioner, and *United States* v. *Ward*, 448 U.S.242 (1980), a case cited by the State but one which hardly supports its position. Through the device of its label for the proceeding as an involuntary commitment procedure, the State lands on *Addington* v. *Texas*, 441 U.S. 418 (1979), which, for it, is firmer ground. It then is able to argue at some length, under *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), regarding the need for a privilege against self-incrimination in a proceeding labeled a civil involuntary commitment procedure.

This case, though, does not involve a civil involuntary commitment procedure. Nor is this Court obliged to determine the applicability of the privilege to such a procedure. The Illinois sexually-dangerous-person proceeding is not a civil involuntary commitment procedure simply because, as the State has argued, it is in some respects different from a criminal case. It is its own type of proceeding, perhaps somewhat different from a criminal case but certainly vastly different from a "true" civil involuntary mental-health commitment. Since it is, it should be judged by cases such as *Specht*, *Gault*, *Estelle*, and *Ward* but not by *Addington* or *Mathews*. These then will be the points of petitioner's reply.

A. The Illinois Sexually-Dangerous-Person Proceeding Is Totally Unlike A "True" Involuntary Mental-Health Procedure Not Only In That It Arises In A Criminal Context And Is Conducted Much Like A Criminal Prosecution But Also Because It Can Result In A Unique Adjudication Of Sexual Dangerousness And In Commitment To A Prison, At Which The Committed Person Is Considered A Prisoner And From Which He Has Only A Speculative Chance Of Release.

The State of Illinois opposes the application of the privilege against self-incrimination in the Illinois sexually-dangerous-person proceeding. It analogizes the proceeding to an involuntary mental health procedure and argues that such a procedure cannot be a "criminal case." It rails about the practical effect of applying the privilege to such a procedure and, in a separate point, about the effect of requiring *Miranda* warnings to effectuate the privilege.

The State's argument, however, totally fails to come to grips with the realities of the sexually-dangerous-person proceeding. Only by totally ignoring the processes and results of the proceeding can the State come to label it as an involuntary mental-health commitment procedure. It is important, as a result, to examine just how a sexually-dangerous-person proceeding differs from the "true" involuntary mental-health commitment procedure in Illinois [set out in Ill. Rev. Stat. ch. 91½, §§ 1-100, *et seq.* (1983)]. Such an examination reveals that the dangerousness proceeding may differ slightly from a criminal prosecution but is certainly light years away from the involuntary mental-health commitment process.

A point which the State does not, indeed cannot, contest is that the sexually-dangerous proceeding is tied to a criminal case from its very inception. A petition seeking a sexually-dangerous adjudication, unlike a petition for mental-health commitment, can be filed only where a

person has been charged with a criminal offense. The party seeking the adjudication can only be the prosecutor in the criminal prosecution, not the trial judge, a mental-health professional, a relative or friend of the accused or the accused himself. It is clear from all this that the origin of the sexually-dangerousness proceeding is in a criminal case and its primary actor the criminal-case prosecutor.[1]

The State also does not contest the close similarity between the conduct of a sexually-dangerousness proceeding and the conduct of a formal criminal prosecution.[2]

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[1] The State, in advancing its claim that the sexually-dangerous-person proceeding is a mere treatment plan as an alternative to prosecution, also compares the proceeding to that under the Alcoholism and Substance Abuse Act [Ill. Rev. Stat. ch. 111½, §§6301, *et seq.* (1984 Supp.)] (Brief for Respondent at 13 n.4). The Abuse Act, though, contemplates an application for treatment made by the affected person himself, either within or without a formal criminal prosecution. It also contemplates treatment commitments sought by persons other than the affected person and, in fact, obligates a criminal-case judge to take action if an affected person comes before him.

[2] This point is important to the question of the applicability of the privilege against self-incrimination. The Sixth Amendment, like the Fifth, refers to a criminal proceeding. While the Fifth Amendment privilege against self-incrimination is generally considered broader in scope than the Sixth Amendment's guarantee of rights in a criminal proceeding [*United States* v. *Ward*, 448, U.S. 242, 253 (1980)], Sixth-Amendment jurisprudence is helpful in determining the applicability of the privilege under the Fifth [*e.g.*, *Minnesota* v. *Murphy*, 465 U.S. 420, ____, 79 L.Ed.2d 409, 425 n.7 (1984)]. There can be no question that the sexually-dangerous-person proceeding is far more like a criminal prosecution than any proceeding found non-criminal under the Sixth Amendment. *Cf. Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) (parole- or probation-revocation proceeding not akin to a criminal trial since the State is represented by a probation or parole officer, not a prosecutor, since formal procedures and rules of evidence do not apply and since the hearing body is familiar with practice of parole or probation).

In this respect, too, the sexually-dangerousness proceeding differs dramatically from the involuntary mental-health commitment procedure under Illinois law, one which is characterized by informality and a different burden of proof. *See generally* ch. 91½, §§ 3-800, *et seq.*

Sharp differences also obtain between the dangerousness proceeding and the involuntary commitment procedure as to the findings made during the hearing. The involuntary mental-health commitment looks to a determination of the committee's mental illness and a causally-related and near-future dangerousness to himself or others or an inability to provide for himself. ch. 91½, § 1-119. The sexually-dangerousness proceeding, on the other hand, looks to a determination of a mental disorder as well as other facts. The State must prove additionally that that disorder is "coupled with," though not necessarily the cause of, criminal propensities to the commission of sex offenses. It must also demonstrate that the person whose commitment is sought has demonstrated those propensities toward acts of sexual assault, i.e., that he has committed a sex crime. *See, e.g., People* v. *Allen*, 107 Ill. 2d 91, 481 N.E.2d 690, 696-97 (1985). *See also People* v. *Pembrock*, 62 Ill. 2d 317, 342 N.E.2d 28, 30 (1976) (emphasizing "past conduct" proof in sexual-dangerousness proceeding). Obviously, the sexually-dangerous-person proceeding contemplates far different findings than the involuntary mental-health commitment procedure.[3]

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[3] The State's failure to recognize the distinct findings required in a sexual-dangerousness proceeding impacts adversely on a number of claims it presents. For purposes of this section, it permits the State to suggest that the sexual-dangerousness proceeding is only a "medico-legal inquiry" into the person's mental condition. That is clearly incorrect, as is the State's suggestion that it only attempts to prove a "proclivity" in the course of the proceeding.

The two procedures examined here also differ greatly in the type of commitment ordered if the necessary findings of "subject to involuntary commitment" or "sexually dangerous" are made. The State is content to say that both procedures contemplate "treatment" of the person. But that ignores a great deal more than it considers. The sexually dangerous person is automatically committed to the Menard Psychiatric Center, a penal institution of the Illinois Department of Corrections. He is sent to a maximum-security institution and an ordinary prison cell. He is treated like any other prisoner, being accorded "the same services, privileges, and rights as any other inmate who is incarcerated at [the Menard Psychiatric Center]."[4] The civil mental-health committee, on the other hand, is committed (if at all) to a mental-health facility under the Department of Mental Health and Developmental Disabilities. He is so committed only after the committing court has fulfilled its statutory obligation of considering all appropriate treatment settings (including placement with a relative) and concluding that formal commitment is the "least restrictive alternative for treatment which is appropriate." Ill. Rev. Stat. Ch. 91½, §§ 3-810, 3-811 (1983). Even if committed to a mental-health facility, the committee enjoys a "bill of rights" specified by statute, including full mail, telephone and visitation privileges, a right to possess money and other personal property, a right to avoid seclusion as a form of discipline, and the like. Ch. 91½, §§ 2-100 to 2-111. In light of all this, the commitment situation of the sexually dangerous person simply cannot be equated with that of the mental-health committee.

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[4] The quotation is from the statistical report prepared by Michael Dolan, referred to in the Respondent's brief and added in full by letter to the Clerk on February 25, 1986 (hereinafter "Dolan Report").

These two committees also differ in terms of their prospects for release or discharge. A mental-health commitment in Illinois lasts for 60 days, a period which can be extended for an additional 60 days and, thereafter, for periods of 180 days. As to each commitment period, the State bears the burden of showing both that involuntary commitment is necessary and that institutionalization is the least restrictive alternative which is appropriate. Ch. 91½, § 3-813. (In the interim, the facility director would have provided updated treatment plans and reports for the committing court's review. Ch. 91½, § 3-814.) During any period of institutionalization, the committed person may petition for discharge. Ch. 91½, § 3-900. At the subsequent hearing, the State again bears the burden of proving the need for involuntary commitment. Ch. 91½, § 3-901. The director of the facility to which the person is committed also is obligated, by statute, to discharge the person at any time when he is no longer subject to involuntary admission. Ch. 91½, § 3-902. All of this, too, is in stark contrast to the lot of a sexually dangerous person. He has been committed to Menard Psychiatric Center, a maximum-security penal institution, on the basis of an adjudication of sexual dangerousness. That commitment is indefinite in duration and not subject to mandatory periodic review. No one is statutorily obliged to seek his discharge or even to draw up or pass on a treatment plan aimed at accomplishing his discharge. He may, of course, file a petition seeking his discharge. He has the burden, though, of demonstrating the fact of his recovery. *People* v. *Parrott*, 108 Ill. App. 3d 222, 438 N.E.2d 1313, 1315-16 (1982). If he fails, he returns to the Department of Corrections. If he's only partially successful, i.e., if he leaves doubts regarding his full recovery, he is conditionally discharged—a conditional liberty subject to revocation. Ill. Rev. Stat. ch. 38, § 105-9 (1983).

The foregoing comparison of the sexually-dangerous-person proceeding and the "true" involuntary mental-health commitment can only demonstrate that the two are vastly dissimilar. The former is closely tied to a criminal prosecution and in fact looks like one, though the latter is not and does not. A person's commitment as sexually dangerous is far different and far more onerous than a commitment as mentally ill. The prospects for a person's release from the commitments are vastly different as well.

Thus, in reviewing the need for a privilege against self-incrimination in the sexually-dangerous-person proceeding, this Court should not be deceived by the State's attempt to label the proceeding as a simple involuntary mental-health commitment procedure. The proceeding is far different and, as a result, deserves more careful analysis than the State invites.[5]

B. Given The Similarities Between The Sexual-Dangerousness Proceeding And The Criminal Prosecution And The Dissimilarities Between It And The Mental-Health Commitment, This Courts' Decisions On The Topics Of Sexual-Psychopath Legislation And The Fifth Amendment—Not On Involuntary Mental-Health Commitments—Are The Most Persuasive Authority.

The State's denomination of the sexually-dangerous-person proceeding as an involuntary mental-health com-

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[5] Even if the sexual-dangerousness proceeding were simply a "true" involuntary mental-health commitment procedure, there would be dispute regarding the applicability of the privilege. The New York Mental Health Information Service as *amicus curiae* argues that the privilege attaches at the adjudicatory stage of any civil commitment proceeding. While petitioner thinks that that question is broader than the instant case and thus takes no formal position, he does dispute the State's suggestion (at pages 9-10) that everyone "apparently agree[s] that traditional mental health commitment proceedings are civil actions to which the fifth amendment exclusionary rule does not apply."

mitment procedure is not only potentially deceiving as a matter of fact, as outlined above at Part A. It also tends to mislead in regard to the precedent of this Court which should be applied in deciding the issue presented here, the applicability of the privilege against self-incrimination.

In arguing that the privilege should be applicable in a sexually-dangerous-person proceeding, the petitioner clearly has relied on cases of this Court considering sexual-psychopath legislation [e.g., *Specht* v. *Patterson*, 386 U.S. 604 (1967)] and on specific Fifth-Amendment jurisprudence of this Court [e.g., *In re Gault*, 387 U.S. 1 (1967) and *Estelle* v. *Smith*, 451 U.S. 454 (1981)]. The State, however, mentions *Specht* hardly at all (Brief for Respondent at 10 and 13) and quickly disposes of both *Gault* and *Smith* by saying that neither considers "involuntary commitment hearings" or "proof of mental status" (*Id.* at 21). Once the State's deceiving "mental-health commitment" approach is put to one side, however, the pertinence of *Specht*, *Gault* and *Estelle* again is apparent.

An obvious shortcoming of the State's response is its total failure to confront *Specht* v. *Patterson*. That case concerns sexual psychopath legislation, which is exactly the type of legislation which the Illinois Sexually Dangerous Persons Act is. As argued in petitioner's original brief, *Specht* calls for a "full panoply" of procedural protection, and "all those safeguards which are fundamental rights and essential to a fair trial" in a sexual-psychopath proceeding. Those protections and safeguards must include a privilege against self-incrimination, as the petitioner went on to argue (Brief for Petitioner at 20-21). To that argument the State has responded only obscurely. The State reads the argument (though attributing it to *Gault*) as a criticism of a host of this Court's decisions (Brief for Respondent at 25-26), yet fails to consider that

not a single decision allegedly criticized concerns the unique sexual-psychopath legislation as *Specht* does. It also makes a passing attempt to distinguish *Specht* (*Id.* at 13 n.4) on the grounds that *Specht* concerned a sexual-psychopath-commitment scheme triggered *after* formal conviction (with full criminal-trial safeguards). The State fails to realize, though, that any such distinction must necessarily redound in petitioner's favor.[6]

The State's brief as Respondent is no more diligent in its attention to *In re Gault* and *Estelle* v. *Smith*. According to the State, neither case comes into play in determining whether the sexually dangerous person proceeding is a "criminal case" for purposes of the Fifth Amendment and its privilege against self-incrimination. (See Brief for Respondent at 20.) That is surprising—and indefensible—since both cases are Fifth-Amendment cases (at least in the parts relied upon by the petitioner). *Gault* carefully examines the juvenile-delinquency proceeding, focuses on the nature and extent of the possible confinement involved and the nature of the stigma resulting from the proceeding, and concludes that the delinquency proceeding "must be regarded as 'criminal' for purposes of

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[6] The commitment scheme in *Specht* did arise after formal conviction, e.g., after the defendant had been convicted (with full procedural safeguards) and found deserving of some sort of sanction, either criminal sentencing or commitment as a sex offender. The sexual-dangerousness proceeding in Illinois combines the adjudicatory and dispositional phases into one hearing.

The concerns of *Specht* were twofold: that the sexual-psychopath proceeding was open to abuse and that it involved a new and separate factual finding made without adequate safeguards. Neither concern is eliminated—indeed the former may be worsened—by a proceeding which calls for the unique finding of sexual dangerousness and an automatic commitment based on that finding.

the privilege against self-incrimination." *In re Gault*, 387 U.S. 1, 49 (1967). It did so despite recognizing the facts that juvenile proceedings were not equivalent to formal criminal prosecutions and had a substantial rehabilitative, rather than punitive, purpose. It must be considered pertinent here as well, even if the sexually-dangerous-person proceeding is not a formal criminal prosecution and even if it can be assigned something of a treatment purpose. So, too, should *Estelle* v. *Smith*. The sentencing proceeding in *Estelle*, like the proceeding at issue, did not "resolve specific factual issues of guilt or innocence" (Brief for Respondent at 15). It instead involved an inquiry into the question of the defendant's "future dangerousness," certainly a "medico-legal inquiry" (*Id.* at 11). This Court nevertheless held the privilege against self-incrimination fully applicable. The significance of its having done so should not be ignored in the case at bar, as the State has done.

Interestingly, the State does mention, but fails to develop, the one Fifth-Amendment decision of this Court which is most tolerant of reference to "civil" and "criminal" labels. On inspection, its failure to develop the case is not surprising: the case simply does not support its point. In *United States* v. *Ward*, 448 U.S. 242 (1980), this Court considered whether a proceeding for assessment of a "civil penalty" under the Federal Water Pollution Control Act was a "criminal case" for purposes of the Fifth Amendment privilege against self-incrimination. The Court noted a traditional two-part test for determining whether a penalty is civil or criminal: 1) whether the legislature has expressed a preference for one label over another and 2) whether, in the event of a civil label, the statutory scheme was nevertheless so punitive in purpose or effect as to overcome the label. *Id.* at 248-49. According

to the Court, the standards set forth in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), were "helpful," but not "exhaustive" or "dispositive," as to the second prong of the test. *Id.* at 249. The Court went beyond that two-part test in order to "completely dispose" of the case, noting that a proceeding, in any event, could be "'quasi-criminal' and therefore sufficient to implicate the Fifth Amendment's protection against compulsory self-incrimination." *Id.* at 251.

While application of the various tests resulted in a finding in *Ward* that the civil-penalty proceeding was not a "criminal case," it would mean a clear "criminal case" result in the case at bar. There is no question that the Illinois legislature has opted for a "civil" label in the sexual-dangerousness proceeding. There is likewise no question, however, that the statutory scheme is so punitive in effect as to overcome that label. Illinois has shown what a truly "civil" mental-health commitment is all about. As discussed above (at Part A), the sexually-dangerous-person commitment is vastly different from and far more punitive than that mental-health commitment. The civil label, as a result, cannot control.[7] Exam-

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[7] Application of the factors from *Kennedy* v. *Mendoza-Martinez* supports that conclusion. The sanction here—an indeterminate commitment to a penal facility—obviously involves an "affirmative disability or restraint." Commitment to such an institution, especially as contrasted to a mental-health facility, must be "regarded as a punishment." To the extent that the sexual-dangerousness proceeding involves proof of the demonstration of propensities to commit sex crimes, i.e., the proof of the commission of sex offenses, the proceeding involves "a finding of scienter" and applies to behavior which "is already a crime." The "traditional aims of punishment" are being promoted by the sexual-dangerousness commitment since the committed person is isolated from the public for the public's protection. While a rational "alternative purpose," i.e., treatment of the com-

ination of the sexually-dangerous-person proceeding surely reveals, in any event, that it is at least "quasi-criminal" and thus sufficient to implicate the protection of the Fifth Amendment. As noted, both above and in the original brief, the proceeding arises only in the context of a criminal prosecution, is conducted much like a criminal trial and results in an indeterminate, perhaps lifelong, commitment to a penal facility. For all these reasons, the sexually-dangerous-person proceeding must be considered a "criminal case" under the principles of *United States* v. *Ward*.

This Honorable Court must keep its Fifth-Amendment decision in *Ward* in mind in resolving the issue presented in the instant case. The Court's decisions in *Specht* v. *Patterson*, *In re Gault* and *Estelle* v. *Smith* are also pertinent to the Court's inquiry here. The State's brief fails to confront those cases, instead choosing to ignore them through the expedient, but factually deceptive, process of labeling the sexually-dangerous-person proceeding as a simple involuntary mental-health commitment process. The State's approach to the case law is no sounder than its labeling process.

C. The State's Reliance On Cases Such As *Mathews* v. *Eldridge*, 424 U.S. 319 (1976)—To Balance Interests In Having The Privilege Apply In A Sexual-Dangerousness Proceeding—Is Totally Misplaced. The Case Is Of Dubious Relevance To The Question Presented Here And, In Any Event, Does Not Support The State's Position.

Like the Illinois Supreme Court in its decision below, the State forwards this Court's decision in *Mathews* v.

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mitted person, is assignable to the commitment, the indeterminate commitment to a penal facility "appears excessive in relation to the alternative purpose assigned"—especially when compared to the "true" mental-health commitment.

Eldridge for the proposition that the privilege against self-incrimination should not apply in an Illinois sexually-dangerous-person proceeding. According to the State, the privilege is not applicable to the proceeding under the direct "criminal-case" language of the Fifth Amendment. Nevertheless, the State continues, the privilege may be applicable as a matter of fundamental fairness under the broad contours of the due-process clause. Due process requires, though, an "accommodation of competing interests," the key to which is determining "the probable value, if any, of [an] additional procedural safeguard" (Brief for Respondent at 22, citing *Mathews* v. *Eldridge*). The State then goes on to argue that fundamental fairness does not require application of the privilege (Brief for Respondent at Part B) because the privilege would serve no useful and distinctive purpose (*Id.* at Part C) and would in fact thwart the diagnostic and treatment purposes of the proceeding (*Id.* at Part D).

The shortcomings of the State's brief in regard to addressing direct Fifth-Amendment jurisprudence have been discussed at length above. Shortcomings just as obvious appear, however, as to the due-process aspect of the State's brief.

It is clear, first of all, that the State's due-process analysis under *Mathews* v. *Eldridge* is ill-suited for resolution of the issue presented here. *Mathews*, after all, dealt with the termination of Social Security disability benefits and looked to determine the due-process sufficiency of the administrative procedures used for the termination. The applicability of the privilege against self-incrimination, though, is a different inquiry, one not concerned with a due-process balancing of interests. That much is clear from this Court's handling of Fifth-Amendment privilege claims in cases such as *In re Gault*, 387 U.S. 1 (1967),

United States v. *Ward*, 442 U.S. 242 (1980) and *Estelle* v. *Smith*, 451 U.S. 454 (1981), none of which involve due-process analysis.[8]

Even if the State, like the Illinois Supreme Court before it, is correct in urging a due-process balancing of interests in the instant case, that balancing would not disfavor the privilege against self-incrimination, as the State suggests in its brief.

It must be noted here, too, that the State is simply unwilling to come to grips with the realities of the sexually-dangerous-person proceeding in its analysis of the first factor from *Mathews* v. *Eldridge*, the private interest involved in the proceeding at issue. The State (at pages 25-26 of brief) denigrates both the "massive curtailment of liberty" [*Humphrey* v. *Cady*, 405 U.S. 504, 509 (1972)] and the severe societal stigma [*United States ex rel. Stachulak* v. *Coughlin*, 520 F.2d 431, 936 (7th Cir. 1973), *cert. denied*, 424 U.S. 947 (1976)] involved in an adjudication of sexual dangerousness. The indeterminate, perhaps lifelong, commitment to a penal institution following such an adjudication simply cannot be compared with the revocation of a conditional liberty [e.g., *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973) and *Minnesota* v. *Murphy*, 465 U.S. 420 (1984)] or with the temporally limited and systematically reviewed commitment to a mental-health facility [e.g., *Addington* v. *Texas*, 441 U.S. 418 (1979) and *Parham* v. *J.R.*, 442 U.S. 584 (1979)], as the State has done. Furthermore, while "reputation *alone*" may not be

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[8] As pointedly noted by the American Psychiatric Association in its brief as *amicus curiae* (at page 22), a due-process balancing of interests would almost certainly result in the privilege's being "balanced away," even in a formal criminal prosecution, since proceeding without a privilege would always serve a compelling governmental need.

a constitutionally protected interest (Brief for Respondent at 25; emphasis added), it certainly gains such stature when combined with an indefinite commitment to a penal institution, a commitment which can exceed in length the sentence of a formally convicted sex offender. *See Stachulak* v. *Coughlin; People* v. *Burnick*, 14 Cal. 3d 306, 121 Cal. Rptr. 488, 535 P.2d 352 (1975). The State hardly persuades with its understatement of the private interest involved in the sexually-dangerous-person proceeding.

The State is no more persuasive in its discussion of the second interest to be weighed under *Mathews* v. *Eldridge*, the probable value of the sought-after procedural safeguard. The State takes pains to contrast and confuse the positions of the petitioner and *amici* regarding the "societal values to be promoted by the Fifth Amendment" (Brief for Respondent at 27, n. 12). Suffice it to say that reliability is a concern of the privilege (*In re Gault*, 387 U.S. at 44-45) and that an acknowledgement of guilt by a person, "especially one of defective mentality or peculiar temperament," is suspect. *Id. See also Blackburn* v. *Alabama*, 361 U.S. 194 (1960). The State makes a number of other claims in response but none withstand analysis. The State notes that the petitioner has made no claim of actual coercion (Brief for Respondent at 29). But, as this Court noted in *New Jersey* v. *Portash*, 440 U.S. 450 (1974), statements made under legislative compulsion are the essence of coerced statements. Here, the petitioner was subjected to compulsory psychiatric examinations and was obliged to talk. That circumstance itself establishes coercion. The State also asserts that the examining psychiatrists were not concerned with the truth or falsity of the petitioner's statements in determining his mental condition and that, as a result, there should be no concern with the possibility of false statements in the sexually-

dangerous-person proceeding. Here, too (see above at Part A, n.3), the State ignores that the proceeding involves more than findings of mental condition, that it goes beyond that to the objective findings of the person's having demonstrated his propensities toward the commission of sex offenses. The grave danger of a false statement of guilt as to these findings is apparent.[9]

Another claim of the State is common to its discussion of both the second and third factors of *Mathews* v. *Eldridge*. In this regard, the State asserts that it cannot "shoulder the entire load" [*Murphy* v. *Waterfront Comm'n.*, 378 U.S. 52, 55 (1964) (citation omitted)] in a sexually-dangerous-person proceeding or produce the necesary evidence in such a proceeding "by the independent labors of its officers" [*Culombe* v. *Connecticut*, 367 U.S. 568, 582 (1961)] and must instead have the "best evidence" in the case, the person's own statements, even over his claim of the privilege against self-incrimination (Brief for Respondent at 31-32). In a related vein, directed to the third *Mathews* factor—the State's interest in proceeding

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[9] In regard to the State's claim that a Fifth-Amendment privilege would serve no useful purpose in a sexually-dangerous-person proceeding, it should also be noted that the State ignores other procedural functions of the privilege itself. It seems clear that, if no privilege obtains, the subject of the sexual-dangerousness petition could be required to assume the stand during the proceeding. That surely would present the situation of the person's becoming an active participant in his own commitment. That, in turn, would add still another distinction from the "true" mental-health commitment procedure, where the subject cannot be obliged to testify as an adverse witness since he does enjoy a privilege of silence. *See generally In re Collins*, 102 Ill. App. 3d 138, 429 N.E.2d 531, 538 (1981) (referring to Ill. Rev. Stat. ch. 91½, §2-100, guaranteeing civil-commitment subject "all rights, benefits or privileges" guaranteed by law or the Constitution).

without the procedural safeguard—the State asserts that application of the privilege "would thwart the diagnostic and treatment purposes of the proceedings" (*Id.* at 33-35). The State's assertions miss the mark. While it may be desirable to have expert testimony on the person's mental condition in the sexually-dangerousness proceeding, it is simply not true that that testimony must be based on the person's own words during a psychiatric examination. As this Court has recognized, an expert can properly form an opinion of a person's mental condition through review of previously collected materials or in response to a hypothetical question, all without a personal examination of the subject. *Barefoot* v. *Estelle*, 463 U.S. 880, 903-04 (1983). *See also* the brief of the American Psychiatric Association as *amicus curiae* at 23. The Sexually Dangerous Persons Act obviously poses no bar to that type of opinion evidence. *See, e.g., People* v. *Covey*, 34 Ill. 2d 195, 215 N.E.2d 220, 222 (1966) (expert in sexual-dangerousness proceeding may give opinion based on "the personal observations of the expert or on the evidence of other witnesses detailing facts and circumstances which tend to show the mental disorder") and *People* v. *Cooper*, 64 Ill. App. 3d 880, 381 N.E.2d 1178, 1183 (1978) (expert in such proceeding may consider customarily utilized psychological reports, such as results of personality test).

The State's second assertion—that application of the privilege would thwart the diagnostic and treatment purposes of the sexually-dangerousness proceeding—is equally misguided. No treatment occurs at the point at issue here—during examination by a non-treating psychiatrist in advance of the sexual-dangerousness hearing. Even the treatment involved in the proceeding, i.e., that following the formal hearing and adjudication, would hardly be affected at all. *See In re Gault*, 387 U.S. 1, 51 (1967) (debunking notion that compulsory self-incrimina-

tion is "good for the soul" as the commencement of therapy). *See also* Dolan Report, which notes that the treatment director gives the sexually dangerous person an absolute right to refuse treatment altogether (Report at 2). The effect of the privilege upon the diagnostic aspect of the proceeding is likewise dubious. Importantly, in a point conspicuously ignored by the State, Illinois has concluded that "application of the privilege against self-incrimination does not seriously impair the State's ability to achieve the valid objectives of civil commitment." *Matter of Rizer*, 87 Ill. App. 3d 795, 409 N.E.2d 383, 386 (1980).

In light of all this, this Court must conclude that the State's reference to *Mathews* v. *Eldridge* cannot help its cause. The case and the due-process balancing of interests it suggests are hardly pertinent to the issue presented here. Even if they were, the various interests, properly set forth and balanced, do not militate against application of the privilege against self-incrimination to the Illinois sexually-dangerous-person proceeding. Even under *Mathews*, the privilege should be found applicable.[10]

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[10] The State also argues in a separate point (Brief for Respondent at Part II) that even if this Court finds the privilege applicable, it should declare that the privilege is not self-executing and thereby deny relief to the petitioner. In this regard the State relies on points advanced but rejected in *Estelle* v. *Smith*, 451 U.S. 454 (1981). For that reason, extended reply is unnecessary.

The petitioner would note, however, that the State's reliance on the presence of counsel in this proceeding (Brief for Respondent at 37-38) is misguided. As noted by the Illinois Supreme Court, there is not now and has never been a privilege of silence in an Illinois sexual-dangerousness proceeding. *People* v. *Allen*, 107 Ill. 2d 91, 481 N.E.2d 690 (1985). Given this fact, counsel could not have advised petitioner to assert a privilege since he would have only involved his client in contempt proceedings. *See, e.g., People* v. *Redlich*, 401 Ill. 270, 83

CONCLUSION

For the reasons set forth here and in petitioner's original brief, this Honorable Court should reverse the order of the Illinois Supreme Court approving petitioner's adjudication and commitment as a sexually dangerous person.

RESPECTFULLY SUBMITTED,
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N.E.2d 736 (1949).

The petitioner also notes the State's passing claim of deliberate waiver, i.e., that petitioner sought sexual-dangerousness adjudication. That claim is based only on off-hand observation of one examining psychiatrist, an observation undeveloped by the State at the dangerousness hearing. Moreover, that claim—like every other claim of waiver—was specifically rejected by the only court to pass on it. *See People* v. *Allen*, 123 Ill. App. 3d 669, 463 N.E.2d 135 (1984), *rev'd on other grounds*, 107 Ill. 2d 91, 481 N.E.2d 690 (1985).